PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

1285 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10019-6064
TELEPHONE (212) 373-3000

LLOYD K. GARRISON (1946-1991)
RANDOLPH E. PAUL (1946-1956)
SIMON H. RIFKIND (1950-1995)
LOUIS S. WEISS (1927-1950)
JOHN F. WHARTON (1927-1977)

WRITER'S DIRECT DIAL NUMBER
(212) 373-3311
WRITER'S DIRECT FACSIMILE
(212) 492-0311
WRITER'S DIRECT E-MAIL ADDRESS
rfinzi@paulweiss.com

UNIT 5201, FORTUNE FINANCIAL CENTER
5 DONGSANHUAN ZHONGLU
CHAOYANG DISTRICT, BEIJING 100020, CHINA
TELEPHONE (86-10) 5828-6300

SUITES 3601 – 3606 & 3610
36/F, GLOUCESTER TOWER
THE LANDMARK
15 QUEEN'S ROAD, CENTRAL
HONG KONG
TELEPHONE (852) 2846-0300

ALDER CASTLE
10 NOBLE STREET
LONDON EC2V 7JU, UNITED KINGDOM
TELEPHONE (44 20) 7367 1600

535 MISSION STREET, 24TH FLOOR
SAN FRANCISCO, CA 94105
TELEPHONE (628) 432-5100

FUKOKU SEIMEI BUILDING
2-2 UCHISAIWAICHO 2-CHOME
CHIYODA-KU, TOKYO 100-0011, JAPAN
TELEPHONE (81-3) 3597-8101

TORONTO-DOMINION CENTRE
77 KING STREET WEST, SUITE 3100
P.O. BOX 226
TORONTO, ONTARIO M5K 1J3
TELEPHONE (416) 504-0520

2001 K STREET, NW
WASHINGTON, DC 20006-1047
TELEPHONE (202) 223-7300

500 DELAWARE AVENUE, SUITE 200
POST OFFICE BOX 32
WILMINGTON, DE 19899-0032
TELEPHONE (302) 655-4410

October 5, 2023

BY ECF

The Honorable Sidney H. Stein
U.S. District Judge, Southern District of New York
United States Courthouse
500 Pearl St.
New York, NY 10007-1312

Re: *United States* v. *Menendez et al.*,
1:23-cr-00490-SHS

Dear Judge Stein:

We write on behalf of all defendants in this case and in response to the government's letter to the Court sent yesterday afternoon regarding a proposed protective order. In particular, we write to respectfully propose two small but important modifications that the defendants raised with the government but that the government rejected after otherwise productive discussions. The first modification is consistent with language the government has agreed to in other cases. The second arises out of the *sui generis* nature of the allegations raised in the Indictment. In making these proposals, we note that separate arrangements will be required for classified material, which is beyond the scope of this order.

Our two proposals—reflected in the attached redline to the government's proposed order, (Ex. A), and clean draft (Ex. B)—are as follows:

1. We ask that the language of Paragraph 11 be amended to include language (as shown in the attached redline, Ex. A) that makes explicit that, if there is a dispute as to the designation of a particular document that cannot be resolved by the parties, the government bears the burden of establishing "good cause" for the restrictions sought. This language is consistent with established law and with multiple protective orders sought by the government and entered by courts in this district. *See, e.g.*, Protective Order ¶ 7, *United States* v. *Vieser*, No. 22-cr-101-JMF (S.D.N.Y. Mar. 2, 2022), ECF No. 12 ("The Government shall bear the burden of establishing good cause for its designation of the disputed materials."); Protective Order ¶ 9, *United States* v. *Marte*, No. 16-cr-740-GHW (S.D.N.Y. Mar. 25, 2021), ECF No. 274 ("The Government shall bear the burden of establishing good cause for its designation of the disputed materials as Confidential Material or Attorneys' Eyes Only Material."); Protective Order ¶ 10, *United States* v. *Delo*, No. 20-cr-500-JGK (S.D.N.Y. Mar. 18, 2021), ECF No. 41 ("The Government shall bear the burden of establishing good cause for its designation of the disputed materials as Confidential Material or Sensitive Disclosure Material."); Protective Order ¶ 1(b), *United States* v. *Lopez*, No. 19-cr-323-JSR (S.D.N.Y. Nov. 26, 2019), ECF No. 52 ("The Government thereupon will have the burden of justifying the continuation of that designation.").

As Judge Furman explained in denying the government's application to expand a protective order in *United States* v. *Tokhtakhounov*, "[under] Rule 16(d)(1), the Government bears the burden of showing 'good cause,' which 'is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing." No. 13-cr-268-JMF, 2020 WL 1032880, at *3 (S.D.N.Y. Mar. 3, 2020) (quoting *United States* v. *Wecht*, 484 F.3d 194, 211(3d Cir. 2007)); *see also United States* v. *Ramirez*, No. 21-cr-41-AJN, 2021 WL 914457, at *1 (S.D.N.Y. Mar. 10, 2021) ("The party seeking to restrict disclosure bears the burden of showing good cause." (citing *Gambale* v. *Deutsche Bank AG*, 377 F.3d 133, 142 (2d Cir. 2004))). Without the language requested by the defendants, the protective order proposed by the government would eliminate this requirement and improperly shift the burden to the defendants.

2. The government's version of the protective order provides, at Paragraph 15, that the defense may not show any foreign person or entity any "Protected Material" without leave of the Court. As reflected in the attached redline, Ex. A, we request that this provision—which imposes a significantly higher burden on the defense in dealing with foreign individuals and/or entities—be amended to apply only to material designated as "Attorney's Possession Only" or "Attorney's Eyes Only." We respectfully submit that—particularly in a case that includes allegations of conduct involving foreign actors on foreign soil—a provision covering all foreign nationals or entities should be narrowly tailored, and therefore propose that it be limited to documents that the government truly believes are sensitive. *See Ramirez*, 2021 WL 914457, at *1 (The determination of whether the government has established good cause for the entry of a protective order "requires courts to balance several interests, including . . . whether the imposition of the protective order would prejudice the defendant"); *United States* v. *Smith,* 985 F. Supp. 2d

506, 524 (S.D.N.Y. 2013) ("courts should take care to ensure that the protection afforded to [discovery] information is no broader than is necessary to accomplish the [proffered] goals" of the protective order (citing *United States* v. *Lindh*, 198 F. Supp. 2d 739, 741–42 (E.D. Va. 2002))).

Again, we note that nothing in these proposed changes affects classified information, which will be subject to a different regime under CIPA.

Respectfully submitted,

Roberto Finzi

Enclosures

cc: All Counsel (by ECF)